IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 6 of 1999

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR. C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAYNDRA S. SHAH

Versus

MUKUND SOMCHAND SHAH

Appearance:

MR J.R.NANAVATI WITH MR. AR THACKER for Petitioner

MR BP MUNSHI for Respondent No. 1, 2

CORAM : ACTG.CHIEF JUSTICE MR. C.K.THAKKAR

Date of decision: / /2000

CAV JUDGEMENT

Per Thakker, Actg. C.J.:

This petition is filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of arbitrator.

The case of the petitioner was that he entered into a partnership agreement with the respondent by a deed of partnership dated April 3, 1992 in the name and style of Mukund Brass Industries. Clause 14 of the Partnership Deed provided that in case of any difference or dispute mentioned therein, the same would be settled through arbitration proceedings in accordance with the provisions of the Act, as applicable to such proceedings.

According to the petitioner, since dispute had arisen between the parties, he issued a notice on August 4, 1998 to refer the dispute to arbitrator. The respondent, however, failed to refer the matter to arbitrator and hence, the petition.

Notice was issued on April 9, 1999 and it was made returnable on May 7, 1999. The matter was thereafter adjourned from time to time.

I have heard Mr. J.R.Nanavati with Mr. Mr. A.R.Thakker for the petitioner and Mr. B.P.Munshi for the respondent.

Mr. Nanavati submitted that as there was a dispute between the partners, in accordance with Clause 14 of the partnership agreement, the dispute was required to be referred to arbitrator. There was failure on the part of the respondent in referring the matter to arbitrator. The petitioner, therefore, issued notice through advocate which was received by the respondent and even thereafter, several notices were issued but the respondent did not refer the matter to arbitrator and hence, provisions of Section 11 of the Act have been invoked by the petitioner.

Relying on various judgments, Mr. Nanavati submitted that Chief Justice may exercise powers under Section 11 of the Act by appointing an arbitrator in accordance with provisions of the Partnership Deed.

In this connection, Mr. Nanavati drew my attention to the following decisions:

(1) M/s Sundaram Finance Ltd. vs. M/s. NEPC India Ltd.
AIR 1999 SC 565.

(2) Rajbir Singh vs. Union of India
AIR 1999 Delhi 65;

(3) Kulbir Singh vs.New Delhi Municipal Council,
AIR 1998 Delhi 230

(4) Amati Hymavathi vs. Nissankararao Srikrishnamurthy,
AIR 1998 A.P. 345

(5) Elizabeth Mathew vs. S.K.Narayana
AIR 1999 Karnataka 291

(6) Union of India vs. M/s S.K.Ahuja and Co.
AIR 1988 SC 1172.

(7) R.N. Kumar vs. R.K.Soral
AIR 1988 SC 1205

(8) P.K.Ramaiah vs. Chairman & Managing Director
National Thermal Power Corporation,
(1994) Supp. 3 SCC 126 and

(9) Union of India vs. Kishori Lal
AIR 1959 SC 1362

Mr. Nanavati further submitted that all questions on merits raised by the respondent either in reply to the notice or before this Court may be left open and both the parties may be granted liberty to raise all contentions available to them before arbitrator. He, however, contended that the prayer to refer the matter to arbitrator cannot be disputed by the respondent and since there is failure on the part of the respondent in referring the matter to arbitrator, the petitioner was constrained to approach this Court. He, therefore, submitted that appropriate order may be passed referring the matter to arbitrator.

Mr. Munshi for the opponent, on the other hand, submitted that the petition is not maintainable and it deserves to be dismissed. According to Mr. Munshi, the petitioner retired from partnership by a deed of retirement dated May 16, 1994 which is produced in the proceedings. In the said deed, it was stated that as per agreement entered into between the parties, which would be effective from April 1, 1994, the petitioner had retired from the partnership on certain terms and conditions as specified in the deed of retirement. He also submitted that accounts were audited and settled . In the deed of retirement, it was specifically provided that liability of the retiring partner would be upto March 31, 1994. After March 31, 1994, the retiring partner would not be liable for any act of partnership firm. It was also provided that whatever amount which the petitioner ,retiring partner, would be liable to pay

for transactions upto March 31, 1994, would be paid by him to the partnership firm. Similarly, the partnership firm would pay the amount to the retiring partner to which he would be entitled upto March 31, 1994. The deed of retirement was signed by all partners including the petitioner . As per the deed of retirement, the petitioner stood retired from April 1, 1994. Mr. Munshi, therefore, submitted that in view of the deed of retirement, the petitioner could not claim any benefit under the partnership deed and Clause 14 of the partnership deed cannot be pressed into service by the petitioner and the petition deserves to be dismissed.

In this connection, Mr.Munshi drew my attention to the following two decisions :

(1) M.S.Patel vs.Shwashray Construction Company,
23 (1) GLR 312

(2) Vipinbhai vs. General Manager, Western Railway,
24 (2) GLR 1347.

Mr. Munshi also submitted that even on the averments made in the arbitration petition itself, the petition deserves to be dismissed. He drew my attention to paras 3,5,6 and 8 of the petition in which it was alleged by the petitioner that though he had not retired from partnership and that he had not executed any deed of retirement alleged to have been executed on May 16, 1994, such document was sought to be relied upon which was "forged and fraudulent one". Mr. Munshi submitted that whether a particular document was forged or fabricated is in dispute, the question can only be decided by a civil court alone and no petition would lie in this Court.

Mr. Nanavati, no doubt, submitted that accounts were not settled, partnership firm was continued, the petitioner did not stand retired and that even after so called deed of retirement in 1994, an amount of Rs. 1,00,000/- was paid by the respondent to the petitioner. Thus, it is submitted that the petitioner had not retired.

In my opinion, the contentions raised on behalf of the respondent deserve to be upheld. The deed of retirement is on record. It is dated May 16, 1994. It is purported to have been signed by all partners including the petitioner. The factum of such document,therefore, cannot be ignored. True it is, that the case of the petitioner is that no such document was entered into between the parties nor the petitioner had signed such

deed of retirement and that it is forged and fraudulent. In my opinion, however, the submission of the respondent is well founded that whether a particular document is forged or fraudulent can only be decided by a civil court. Once a deed of retirement is placed on record which shows that the petitioner stood retired with effect from April 1, 1994, obviously, he cannot claim benefit of Clause 14 of the Partnership Deed for making an application under Section 11 of the Act, and in requesting the Chief Justice to appoint an arbitrator.

For the foregoing reasons, in my opinion, the petition is not maintainable. It,therefore, deserves to be dismissed and is accordingly dismissed. No costs.

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parekh